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"The rules of evidence are of great importance, and cannot be departed from without endangering private as well as public rights." Story, J., in Hildreth v. Welch, 8 Wheat. 234, 238.

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OFFICIAL REPORT OF THE OPINION BELOW.

The Opinion of the Circuit Court of Appeals (R., 146), is Reported in 16 F. (2d) 86.

1. The judgment to be reviewed is that of the Circuit Court of Appeals for the Third Circuit, dated March 9th, 1926. (R., 146.)

2. At the trial the sole evidence that the bond salesman of the defendant (below), a bond house, had authority to make the alleged contracts in suit to buy back at cost the bonds he sold to the plaintiff (below) if at any time requested, was an unanswered self-serving letter (R., 36), from plaintiff to the defendant, written some seven months after the transaction in suit, which plaintiff offered in evidence. The trial Judge admitted the letter as proof of the facts stated in it—refusing to obey the Conformity Acts, and to follow the uniform decisions of the highest court of Pennsylvania that such a letter was inadmissible for that purpose.

All the decisions of the highest court in Pennsylvania hold such a letter to be inadmissible for that purpose.

The trial court also erred (apart from the Conformity Acts) in not following the uniform decisions of the courts in this country and England holding such a letter to be inadmissible. The Circuit Court of Appeals erred in affirming this ruling and the judgment based upon it.

The entire record is now before this Court with power to decide the case as presented to the Circuit Court of Appeals on the writ of error. *Lutcher & Moore Lumber Co. v. Knight*, 217 U. S. 257, 267.

3. The jurisdiction of this court is based upon the Judicial Code, Sec. 240, taken from the Act of March 3, 1891 (26 Stat. 828; 2 Comp. Stat., Sec. 1217).

4. There is a lack of uniformity in the judgments of several Circuit Courts of Appeals as to whether or not the Conformity Acts apply to state rules of evidence. This present case, therefore, involves the constitutional relations between the United States and the States, and therefore comes within the rule in *Hamilton Shoe Co. v. Wolf Bros.*, 240 U. S. 251, 258 ("Cases of peculiar gravity and general importance, or in order to secure uniformity of decision") and the rule in *Magnum v. Coty*, 262 U. S. 159, 163 ("To secure uniformity of decision between courts in the nine circuits and to bring up questions of importance which it is in the public interest to have decided by this Court of last resort").

STATEMENT OF THE CASE.

The plaintiff below, Walter Peirson, a leather merchant in Philadelphia, bought the following investment securities from the defendant below, A. B. Leach & Co., Inc., a New York bond house having a branch office in Philadelphia, and doing a yearly business of from one hundred to one hundred and fifty million dollars. See Statement of Claim (R., 3). *Peirson* (R., 17-24):

$10,000	William Whitmer & Sons, Inc. Parsons Pulp & Rubber Company, Joint and Refunding 7% Gold Bonds.	
	Purchased June 19, 1920	$9,800
$20,000	Mass Oil & Refining Company, 7% Convertible Gold Bonds.	
	Purchased September 23, 1920	$19,600
$10,000	National Oil Company, First Lien 7% Serial Gold Bonds.	
	Purchased February 28, 1921	$9,850
		$39,250.

The action was brought upon agreements alleged by the plaintiff to have been made by defendant through its bond salesman that it would repurchase the bonds at cost, if requested.

The orders for the bonds were all taken by Charles T. Mather, a bond salesman of defendant at its Philadelphia branch house.

The case was tried February 17-18, 1925.

At the trial Peirson testified to the purchase of the $10,000 Whitmer bonds. A question being asked him (R., 14) as to what Mather, the bond salesman, had said to him at the time of the transaction, defendant's counsel objected on the ground that the agent's authority must first be proved. Upon plaintiff's counsel offer (R., 16), to follow Peirson's testimony as to the transaction with proof of the authority of Mather, the salesman, the Court said:

> "I will overrule the objection in view of the offer of proof, and pass on the sufficiency of the evidence after the evidence is in."

An exception for the defendant was noted. (It is not involved here.)

Peirson then testified that when he purchased the Whitmer bonds, Mather said to him (R., 16):

> "You cannot lose on them. Any time you wish A. B. Leach & Company will take them off your hands at the price you paid for them."

This transaction was on June 19, 1920.

Peirson testified that on September 23, 1920, he bought from defendant $20,000 of Massachusetts Oil bonds, and that at the time of this purchase Mather said to him (R., 19):

> "You cannot lose on them. Any time you wish A. B. Leach & Company will take them off your hands at the price you paid."

He testified that on February 28, 1921, he bought $10,000 of National Oil bonds and that at the time Mather said to him (R., 24):

> "You cannot lose on them. A. B. Leach & Company at any time you wish will take them off your hands at the price you paid for them."

The only evidence as to the authority of the agent to bind his principal was the following:

Peirson then testified that on May 9, 1921 (seven and a half months after he bought the Massachusetts oil bonds), he wrote the defendant a letter in these words (R., 36). It referred only to that one block of bonds.

> "Messrs. A. B. Leach & Co.,
> 115 South Fourth Street,
> Philadelphia.
> Dear Sirs:
>
> When I purchased from you the Mass. Oil & Ref. Co. Bonds it was agreed by Mr. Mather that at any time I so desired you would take them off my hands at cost 98.
>
> I have need of some money and will avail myself of this privilege.
>
> When shall I deliver them to you.
>
> Very truly yours,
>
> WALTER PEIRSON."

He testified that he typed it himself and addressed the envelope and gave it to his clerk, Stinger, to copy and mail.

Peirson was then withdrawn and Stinger was sworn (R., 27).

The defendant was called upon to produce this letter. Defendant's counsel responded that it had never been received and, therefore, he could not produce it.

Stinger then testified that Peirson had brought him the letter and the addressed envelope and that he copied it in a press-copy book and "mailed it" (R., 28).

The copy shown to the witness was on a sheet apparently cut from a press-copy book. Stinger testified that "to the best of his knowledge and belief" that sheet was in the book when he copied it.

A copy of the letter of May 9, 1921, was then offered in evidence (R., 36).

Counsel for defendant objected on the ground that the letter was self-serving:

> "THE COURT: Of course it is a self-serving document but it may become something else if it is received by the defendant."

The objection was overruled and the letter was admitted. An exception was noted for the defendant.

This ruling is covered by the Second Assignment of Error (R., 142).

Mr. Peirson then testified (R., 37), that on May 10, 1921, he saw Mather and Mather arranged to have A. B. Leach & Company lend him $15,000 on his (Peirson's) note with the $20,000 of Massachusetts Oil bonds as collateral, the identical bonds in suit. This loan was made. The note was dated May 11, 1921.

For defendant, Mather, the bond salesman (R., 87, 89), denied having made any of the alleged repurchase agreements. He also testified (R., 90) that his only authority from his house was to take orders for bonds and report them to his company.

Mr. Miller, the vice-president of the defendant, corporation and the head of the Philadelphia branch for seventeen years (R., 100), testified (R., 100) that Mather had no other authority than to take orders for bonds and report them to the house and (R., 101) that he had never authorized Mather to make such repurchase agreements.

Mr. Miller (R., 102) and Mr. Doebler (R., 120) both testified that the defendant had never received the letter of May 9.

Doebler was assistant treasurer (R., 119) and had charge of the incoming mail (R., 120).

The plaintiff's note for $15,000 upon which he had borrowed from the defendant with the $20,000 Massachusetts Oil bonds as collateral security not having been paid, it was set up as a counterclaim. It was admitted to be due.

The Court charged (R., 130):

> "If A. B. Leach & Company received that letter and had notice that their agent had made this agreement and failed to disaffirm the statement made by Mr. Peirson as to what their agent had done or what Mr. Peirson said he had done, then you would be justified in finding that A. B. Leach & Company acquiesced in the agreement made by their agent and that he had authority to do what Mr. Peirson said he had done."

Also (R., 131):

> "If you find that fact [receipt of the letter] against the plaintiff then there is not sufficient evidence in the case to justify any finding on your part that the defendant's agent had the authority which the plaintiff contends he had, because the plaintiff has undertaken to establish the burden put upon him of proving the authority by the testimony of which this letter is the central and controlling piece of evidence."

Inasmuch as the only evidence that the defendant's salesman had authority to make the alleged contracts consisted (without question) in the unanswered self serving letter of May 9, defendant's counsel requested the court to give binding instructions to find a verdict for the defendant (R., 133).

This was refused. Third Assignment of Error (R., 142).

The jury found a verdict for the plaintiff for $14,726.25, being the amount paid for all the bonds ($39,250) less the then value of the bonds ($11,500) and after deducting the counterclaim of $15,000.

Motions for a new trial and for judgment N. O. V. were made and refused and a judgment for plaintiff was entered on the verdict.*

Thereupon the case was taken by writ of error to the Circuit Court of Appeals, which affirmed the judgment of the District Court. The essential part of its opinion is as follows (R., 148):

> "By the finding of the jury, the question of receipt of the letter by A. B. Leach & Company, and their failure to disaffirm it are established in the plaintiff's favor and no error is shown in the verdict unless the Court erred in receiving the letter in evidence. If it was so in error, it follows that the defendant was entitled to binding instructions. Strong objection is made to the admission of the letter, that it was inadmissible, because self-serving. The Court recognized that, standing by itself, the statements of the letter were self-serving and could not affect Leach & Company, and so instructed the jury, saying, as quoted above, that if Leach & Company did not receive it, 'the plaintiff has failed in the proof of authority on the part of Mr. Mather to do what Mr. Peirson claimed he did in making the contract.' On the other hand, if this letter, self serving though it be, was received by Leach & Company, then in the peculiar circumstances of this case the more self serving it was in its assertions, the more insistently it called for disaffirmance by Leach & Company, and if not disaffirmed and repudiated, its self-asserting statements created an acquiescing and consenting sit-

*Although the letter in question referred only to the Massachusetts Oil bonds, yet the trial Court sustained a verdict on all three blocks of bonds

uation against Leach & Company from which a jury might infer that Mather had been authorized to make the statements, or, that having made them, Leach & Company had ratified them. Being pertinent and evidential on the question of ratification, we are of opinion the Judge committed no error in admitting the letter."

This was in effect to hold:

That if the defendant did not receive this letter, the plaintiff had no case.

That if the defendant did receive the letter, then the defendant was bound to answer and repudiate it; otherwise the jury might infer that the agent had had authority to make the contracts in suit.

That the letter was properly admitted in evidence.

A petition for a rehearing was refused without an opinion.

SPECIFICATIONS OF ERROR INTENDED TO BE RELIED UPON.

(R., 142-145.)

2. The learned trial Judge erred in admitting in evidence the letter of May 9, 1921, as follows (R., 36):

"MR. BROWS: I offer in evidence letter of May 9th, 1921, as represented by this copy.

MR. HENDERSON: Objected to.

THE COURT: Well, that is a question for the jury. The credibility of the witnesses is for the jury.

MR. HENDERSON: There has been no testimony that this particular letter was mailed. Mr. Stinger did not say so on the stand.

THE COURT: As I recall it he did say he mailed the letter.

MR. HENDERSON: I further object to this letter as a self serving document, and I ask that it be handed to your Honor to pass upon.

THE COURT: Of course it is a self-serving document but it may become something else if it is received by the defendant.

(Objection overruled. Exception noted for defendant by direction of the Court.)"

3. The learned trial Judge erred in refusing defendant's motion for a directed verdict in favor of defendant, as follows (R., 133):

"MR. HENDERSON: I withdraw all my requests for charge except No. 1.

THE COURT: The point for binding instructions is declined and an exception granted to defendant."

4. The learned trial Judge erred in admitting in evidence the letter of May 9, 1921 (R., 36), and instructing the jury thereon, as follows (R., 131):

"If you find that that letter was written and mailed and received by A. B. Leach & Company, then that would be notice to A. B. Leach & Company of the fact that their agent had made the agreement which is in controversy here, and if they had such notice and they failed to deny that their agent had such authority or that such an agreement was made, then you would be justified in considering that they acquiesced in what the agent had done and that the agent therefore had authority to do it."

although the plaintiff's second purchase of Massachusetts Oil bonds, the Whitmer and the National Oil bonds were not mentioned nor referred to in the said letter.

8. The learned trial Judge erred in entering judgment for the plaintiff and against the defendant (R., 133).

ARGUMENT.

Summary of Points.

1. The trial Judge in ruling upon the admissibility of the letter of May 9, 1921, was bound under the Conformity Acts by the decisions of the highest court of Pennsylvania.

2. By the uniform decisions of the highest court of Pennsylvania, an unanswered self serving letter is not admissible in evidence as proof of the truth of facts set forth therein. Therefore, the trial Judge erred in not rejecting the letter of May 9, 1921, and the Circuit Court of Appeals erred in affirming the judgment.

3. The trial Judge erred in not directing a verdict for the defendant and it was error on the part of the Circuit Court of Appeals to affirm the judgment.

4. All the authorities in all jurisdictions have held that a self serving letter, unanswered, is not admissible in evidence as proof of the facts set forth in it. It was therefore error in the trial Judge not to reject the letter of May 9, 1921, and the Circuit Court of Appeals erred in affirming the judgment of the District Court. The entire record is now before this court with power to decide the case as presented to the Circuit Court of Appeals.

5. There is a lack of uniformity among the decisions of the various Circuit Courts of Appeals as to whether or not, under the Conformity Acts, the Federal Courts in the trial of a common law case, are bound to follow the rules of evidence of the highest court of the state in which the trial is held. It is important that the question be put beyond doubt.

6. Some observations as to *Swift v. Tyson*, 16 Pet. 1.

Point 1.

That the trial Court was bound, under the Conformity Acts, by the decisions of the highest court of Pennsylvania on rules of evidence and erred in not rejecting the letter.

The two following cases appear to be binding authorities:

Bucher v. Cheshire R. Co., 125 U. S. 555, 583 (1888).

"It is also well settled that where a course of decisions, whether founded upon statutes or not, have become rules of property as laid down by the highest courts of the State, by which is meant those rules governing the descent, transfer, or sale of property, and the rules which affect the title and possession thereto, they are to be treated as laws of that State by the Federal courts.

"*The principle also applies to rules of evidence.* In *Ex parte Fisk*, 113 U. S. 713, 720, the court said: 'It has been often decided in this court that in actions at law in the courts of the United States the rules of evidence and the law of evidence generally of the State prevail in those courts.' See also *Wilcox v. Hunt*, 13 Pet. 378; *Ryan v. Bindley*, 1 Wall. 66."

Nashua Savings Bank v. Anglo-American Co., 189 U. S. 221, 228 (1903).

"The 'laws of the several states' *with respect to evidence* within the meaning of this section [R. S. Sec. 721] apply not only to the statutes but to

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The Conformity Act: "The laws of the several states, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the Courts of the United States, in cases where they apply."

(Section 34, Act of September 24, 1789; R. S. Sec. 721; Comp. Stat. Sec. 1537; New Code, Sec. 725.)

the decisions of their highest courts. *Bucher v. Cheshire Railroad Co.*, 125 U. S. 555, 582; *Ex parte Fisk*, 113 U. S. 713, 720; *Ryan v. Bindley*, 1 Wall. 66." *

This rule has been applied in the following cases in various Circuit Courts of Appeals.

American Agricultural Chemical Co. v. Hogan, 213 Fed. 416, 420 (C. C. of A. 1st Circ.).

"Ordinarily the rules of evidence and the law of evidence of the state prevail in the federal courts sitting within the limits of the state. *Ryan v. Bindley*, 1 Wall. 66; *Bucher v. Cheshire R. Co.*, 125 U. S. 555, 583; *Ex parte Fisk*, 113 U. S. 713, 720; *Nashua Savings Bank v. Anglo-American Co.*, 189 U. S. 221, 228. In *Conrad v. Griffey*, 16 How. 38, 47, the rule as generally established is applied, with the remark, 'The rule of evidence is a salutary one, and *cannot be dispensed with in the courts of the United States.*'"

Myers et al. v. Moore Kile Co., 279 Fed. 233, 237 (C. C. of A. 5th Circ.).

"I concur in the judgment of the court upon the single ground that the sufficiency of the proof offered has been settled as a rule of evidence in Texas by the Supreme Court of that state. *Bucher v. Cheshire R. R. Co.*, 125 U. S. 555; *Nashua Savings Bank v. Anglo American Co.*, 189 U. S. 221."

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*Ex parte McNeil, 13 Wall. 236, 243:

"A party forfeits nothing by going into a Federal tribunal. Jurisdiction having attached, his case is tried there upon the same principles, and its determination is governed by the same considerations, as if it had been brought in the proper State tribunal of the same locality."

Home v. Gray, 16 Wall. 203, 221:

"A party going into a National court does not lose any right or appropriate remedy of which he might have availed himself in the State courts of the same locality."

American Issue Pub. Co. et al. v. Sloan, 248 Fed. 251, 253 (C. C. of A. 6th Circ.).

"The result of the Conformity Act (Rev. Stat. Sec. 914; Comp. Stat. 1916, Sec. 1537), the Rules of Decision Act (Rev. Stat. Sec. 721; Comp. Stat. 1916, Sec. 1538), and the Competency of Witnesses Act (Rev. Stat. Sec. 858; Comp. Stat. 1916, Sec. 1464), is to make state statutes relating to the competency of witnesses and the competency of testimony, as well as the state law of evidence generally, binding on the federal courts sitting within such state, except where in conflict with the federal Constitution, statutes, or treaties."

Franklin Sugar Co. v. Luray Supply Co., 6 Fed. (2d) 218, 220 (C. C. of A. 4th Circuit.).

This was an action to recover damages for breach of a contract for the future delivery of sugar.

"The fact that this court is bound by and should follow the decisions of the highest court of the state on the subject of the admissibility of testimony is in our opinion beyond controversy, and we are required so to do as well by statutes of the United States (R. S. Sec. 721, 914 [Comp. Stat. Sec. 1538, 1537]), as by the decisions of its courts. *McNeil v. Holbrook*, 12 Pet. 84; *Vance v. Campbell*, 1 Black 427; *Conn. Mut. Life Ins. Co. v. Union Trust Co.*, 112 U. S. 250; *Bucher v. Cheshire R. Co.*, 125 U. S. 555; *Nashua Savings Bank v. Anglo American Co.*, 189 U. S. 221; *Central Vermont R. Co. v. White*, 238 U. S. 507; *Hinds v. Keith*, 57 F. 10; *Stewart v. Morris*, 88 F. 461; *Pooler v. United States*, 127 F. 519; *American Agricultural etc. Co. v. Hogan*, 213 F. 416; *American Issue Pub. Co. v. Sloan*, 248 F. 251; *Myers v. Moore-Kyle Co.*, 279 F. 233."

Point 2.

By the uniform decisions of the highest court of Pennsylvania, an unanswered, self-serving letter is not admissible in evidence as proof of the truth of facts set forth in it. Therefore, the trial Judge erred in not rejecting the letter of May 9th, 1921, and the Circuit Court of Appeals erred in affirming the judgment.

THE PENNSYLVANIA CASES.

Fraley v. Bispham, 10 Pa. 320 (1849). Gibson, *C. J.*, Rogers, Burnside, Coulter and Bell, *JJ.*

This was an action on a warranty in a sale of tobacco. A letter from the vendee to the vendor stating that the goods were "purchased under a guarantee that the quality of the article was superior" and that the vendor "would reimburse us for any loss we might sustain by the shipment," with a claim of the amount of the loss, and a second letter to the same effect, were rejected. They were written, respectively, about a year and about three months before suit was brought. The plaintiff was non suited.

In the Supreme Court, the judgment was affirmed.

Holler v. Weaver, 15 Pa. 242 (1850). Gibson, *C. J.*, Rogers, Coulter, Bell and Chambers, *JJ.*

This was the case of an answered letter, which, having been answered, was admitted in evidence, but in delivering the opinion of the Court, Rogers, *J.*, said:

> "The letters were admitted as a connected whole; no objection being made to any particular part of the correspondence. *Had the defendants taken no notice of the plaintiff's letter*, which no doubt would have been the case had his present

counsel been at his elbow, *the exception would avail here.*"

This constitutes a clear recognition that the settled rule at that time was that a self serving letter, received but not answered, is not admissible as evidence in favor of the writer as proof of the truth of the statements contained in it.

The question does not appear to have come up again for some years.

It arose again in

Dempsey v. Dobson, 174 Pa. 122, 132 (1896).

This was trespass for the wrongful taking of color books.

The plaintiff had been in the employ of the defendant as a color mixer in the manufacture of carpets. When he left the defendant's employ the defendant refused to permit him to take away his color books containing his formulæ for color mixing. About a month after his employment ceased the plaintiff wrote the defendant a long and argumentative letter, setting forth his grievance of being deprived of valuable trade secrets, worked up by him while in defendant's employ. This letter was admitted under objection. There was a verdict and judgment for the plaintiff.

> WILLIAMS, *J.*: "The first assignment must also be sustained. The letter written after the plaintiff's color books had been returned to him demanding that the copy that had been made should be given to him was inadmissible. It was an argumentative presentation of his view of his rights as an employee and of the grievance of which he complained. It was unanswered. It was the declaration of the plaintiff in his own behalf and was no more admissible because reduced to writing than it would have been if delivered orally. The point is substantially ruled in *Fraley v. Bispham*, 10 Pa. 320."

Kann v. Bennett, 223 Pa. 36, 47 (1909).

This was an action by an owner against a contractor for failure to complete a building contract.

> "In attempting to establish the contention of the plaintiff in this respect there were offered and, as counsel for defendant claim, erroneously admitted in evidence, two letters from the architect to the defendant, written during the progress of the work, in which complaint was made of the unsatisfactory and dilatory way in which it was alleged the defendant was proceeding. The letters set forth a number of specific grounds of dissatisfaction. Under the contract, the architect was made the agent of the owner, and these letters must therefore be regarded as the letters of the plaintiff, written in his behalf by his agent. They set forth an argumentative presentation of the plaintiff's contention, and there seems to be nothing in the record to show that they were actually received, or were ever replied to in any manner by the defendant. The letters therefore amounted to nothing more than declarations by the plaintiff in his own behalf, and as such they should not have been admitted in evidence: *Dempsey v. Dobson*, 174 Pa. 122; *Huckestein v. Kelly & Jones Co.*, 170 Pa. 201; *Fraley v. Bispham*, 10 Pa. 320."

This rule, in the opinion of counsel, has invariably been followed in Pennsylvania. There appears to be no reported case to the contrary.

Point 3.

The trial Judge erred in not directing a verdict for the defendant as requested and it was error on the part of the Circuit Court of Appeals in affirming the judgment of the District Court (3d Assignment R., 133).

The letter in question was the plaintiff's only evidence that the bond salesman had authority to make

the alleged contract to buy back the bonds, if requested. If that letter was inadmissible, then the plaintiff's case fell and it was error not to direct a verdict for the defendant, as requested by defendant's counsel.

Point 4.

All the authorites in all jurisdictions have held that a self-serving letter, unanswered, is not admissible in evidence as proof of the facts set forth in it. It was therefore, error in the trial Judge (apart from the Conformity Acts) not to reject the letter of May 9, 1921, and the Circuit Court of Appeals erred in affirming the judgment of the District Court.

This point is urged independently of Points 1 and 2. The entire record is before this Court with power to decide the case as presented to the Circuit Court of Appeals on the writ of error. (*Lutcher & Moore Lumber Co. v. Knight*, 217 U. S. 257.)

Additional Cases on Self Serving Letters, Unanswered.

THE FEDERAL CASES.

Packer v. United States, 106 Fed. 906 (C. C. A., 2d Circ.), Wallace, Lacombe and Shipman, *C. JJ.*

The plaintiff in error had been convicted of a fraud on the mails. Moody, who was one of the victims of the accused, wrote a letter to the accused after the offenses charged in the indictment had been committed.

WALLACE, *C. J.*:

"It is urged that the last Moody letter was competent because it was a reply to a letter from the accused soliciting further remittances from

Moody. The contention is fallacious unless it can be maintained as a correct legal proposition that a request admits in advance the statements made in response. This would be a very dangerous doctrine, and finds no color of support in the law of evidence. If only that part of the reply refusing to make further remittances had been read, no harm would have been done; but, as has been stated, the letter was, in substance, *a narrative of past events, of which there was no other evidence*, and an argument to demonstrate that the accused had been guilty of a scheme to defraud Moody. It is also urged that that letter was admissible as a tacit admission by the accused of the truth of its statements, it having been proved that the accused did not reply to it. Admissions, of course, may be inferred from silence as well as from express statements, *but it has been uniformly held by the courts that the failure to reply to a letter is not to be treated in a criminal or in a civil action as an admission of the contents of the letter.*"

. . . . . .

"It [silence as an admission of facts] could not be applicable to any case where the letter only tends to support a charge of guilt, and where it has been followed by no action, and no response on the part of the person receiving the letter. *The same principle has been repeatedly applied to civil actions. Faulie v. Denton*, 3 Car. & P. 103; *Gaskill v. Skene*, 14 Ad. & E. (N. S.) 664; *Learned v. Tillotson*, 97 N. Y. 1; *Bank v. Delafield*, 126 N. Y. 418; *Gray v. Ice Cream Co.*, 162 N. Y. 397."

Rumble v. U. S., 143 Fed. 772, 780 (C. C. A. 9th Circ.).

"It will be conceded that a letter written to the defendant, which was *not answered by him*, would not be admissible in evidence as tending to show an implied admission on his part of the truth of the statements contained in the letter."

Citing *Packer v. U. S.*, 106 Fed. 906.

Woolsey v. Haynes, 165 Fed. 391.

Van Devanter and Adams, *C. JJ.*, and Phillips, *D. J.*

Self-serving statements made by a party in letters written after he had reason to believe a controversy was impending, are inadmissible in his behalf (syllabus).

Thrush v. Fullhart, 210 Fed. 1, 6 (C. C. A., 4th Circ.).

"We are further of opinion that the plaintiff's letters of January 20 and 29, 1912, were improperly received in evidence. The declarations of a party in his own interest are not ordinarily admissible, and these letters seem to be essentially of that character. They cannot fairly be regarded as a part of the correspondence between the parties, for they are not in reply to anything defendant had written, nor were they answered by him. They were written nearly three months after the incident with which they are sought to be connected—the return of plaintiff's watch—and one of them certainly, the other apparently, after she had consulted with counsel and had in contemplation a suit against defendant. The fact that he made no reply to these communications did not permit an inference of assent on his part to anything which plaintiff charged against him or claimed for herself, for the law is well settled that failure to answer a letter, under such circumstances as are here disclosed, cannot be regarded as an admission by the party to whom the letter is addressed. In our judgment, *the letters in question are self-serving declarations which should have been excluded as irrelevant and incompetent.*"

Harris v. Egger, 226 Fed. 389 (C. C. A. 6th Circ.).

In an action for fraudulent misrepresentation made on purchasing shares of stock, letters written by plaintiff, which were not in contradiction of his testimony, as well as those by defendant, which contained *self serving declarations*, were properly excluded. (Syllabus.)

Morris v. Norton, 75 Fed. 912, 924, 925.

Taft, *C. J.*, after examining sundry authorities on unanswered letters said:

> "The better supported rule, probably, is that unanswered letters are ordinarily not evidence against the person addressed, as admissions of the truth of statement contained therein. . . . (citing cases), but the rule has some exceptions. *Hayes v. Kelly*, 116 Mass. 300; *Wiggins v. Burkham*, 10 Wall. 129.
>
> "After all, it comes to this: that unanswered statements in letters are seldom to be regarded as admissions by the person addressed, but that exceptional circumstances may justify the court in submitting them to the jury *with a proper caution*."
>
> "In the case at bar the letters relied upon cannot properly be said to have been unanswered. They were part of a running correspondence . . . ."

CASES IN VARIOUS STATE COURTS.

Kumin v. Finz, 229 Mass. 75.

Letters written by plaintiff to defendant before certain renewal notes in suit were endorsed. Held inadmissible.

> "The rule is well established that a person to whom a letter is addressed ordinarily is not re-

quired to make any reply, and failure to answer it is no evidence of the truth of the facts therein stated, because such evidence would be in violation of the rule that a party *cannot make evidence for himself* by his own declarations. It was held in *Wiedemann v. Walpole* (1891) 2 Q. B. 534, that in an action for breach of promise of marriage, the mere fact that the defendant did not answer letters written to him by the plaintiff, in which she stated that he had promised to marry her, was not corroborative of the plaintiff's testimony in support of such promise.

"In the case at bar, the letters offered in evidence were not a part of mutual correspondence between the parties relating to the notes. . . . That such evidence is inadmissible has often been held by this court. *Smith v. Abbott*, 221 Mass. 326; *Pye v. Perry*, 217 Mass. 68; *Fearing v. Kimball*, 4 Allen 125; *Callahan v. Goldman*, 216 Mass. 234."

Gray v. Kaufman, etc., Co., 162 N. Y. 388.

Action for rent.

A tenant's assent to a new letting of premises he has abandoned will not be implied from his failure to answer a letter from his landlord, saying that he would relet them on the tenant's account.

Citing *Learned v. Tillotson*, 97 N. Y. 1; *Bank v. Delafield*, 126 N. Y. 418; *Thomas v. Gage*, 141 N. Y. 506.

Vicle v. McLean, 200 N. Y. 260.

Cullen, *C. J.*:

"It would be difficult to imagine a declaration more self serving than that contained in this statement. *It was purely a narrative of past transactions.* The theory on which it was admissible in evidence seems to be that the defendant's failure, upon the receipt of the statement, to deny its

truth was in the nature of an admission. It is well settled that this is an erroneous view of the law."

Chicago v. McKechney, 205 Ill. 372.

Action for the amount claimed to de due on the construction of a tunnel.

Held: "That a letter written by a party to the other party is not admissible in evidence in his favor, except to show demand or notice, and the fact that such letter remained unanswered does not tend to show acquiescence on the part of the party receiving it." Citing 3 C. & P. 63; 29 Vt. 119; *Bank v. Delafield*, 126 N. Y. 410; *Learned v. Tillotson*, 97 N. Y. 1; *Talcott v. Harris*, 93 N. Y. 567; *Fearing v. Kimball*, 4 Allen 125. (Syllabus.)

To the same effect are the following cases:

State v. Howell, 61 N. J. L. 142;
Boggs v. Stucker, 93 Md. 100;
Sievers v. Cleveland Coal Co., 158 Ia. 574;
State Bank v. McCabe, 135 Mich. 479;
Hammond v. Beeson, 112 Mo. 190;
Hall v. Pratt, 29 Vt. 119.

ENGLISH CASES.

Richards v. Gellatly, L. R. 7 C. P. 127, 131.

"It seems to have been at one time thought that a duty was cast upon the recipient of a letter to answer it, and that his omission to do so amounted to evidence of an admission of the truth of the statements contained in it. But that notion has been long since exploded and the absurdity of acting upon it demonstrated."

Per Willes, J. Byles, Brett and Grove, JJ., concurred.

Wiedemann v. Walpole, 2 Q. B. 534 539 (1891).

This was a suit for breach of promise of marriage. The woman wrote to the man claiming that he had promised to marry her. The letters were admitted at the trial before Pollock, *B.*, and a jury. But in the Court of Appeal it was *held*:

> "The mere fact that defendant did not answer letters written to him by plaintiff in which she stated he had promised to marry her, was held no evidence corroborating the plaintiff's testimony in support of such a promise within the meaning of the statute."

Bowen, *L. J.*:

> "It would be a monstrous thing if the mere fact of not answering a letter which charges a man with some misconduct was held to be evidence of an admission of guilt."

Lord Esher, *M. R.*, Bowen and Kay, *L. JJ.*

Thomas v. Jones, (1920) 2 K. B. 399.

Bastardy. The woman, after the birth of a child, wrote a letter to the appellant in which she said that he was the father of her child and asked him if he intended to provide for it. He did not answer the letter, although he received it.

Lord Reading, *C. J.*:

> "I fully agree with the observation of Lord Esher, *M. R.*, in *Wiedemann v. Walpole*, (1891) 2 Q. B. 534, 538, that the mere fact of not answering a letter containing an assertion is no evidence whatever of an admission of the truth of the assertion."

Thomas v. Jones, (1921) 1 K. B. 22 (C. of A.).

The judgment below was reversed upon the ground that there was no corroborating evidence sus-

taining the woman's story as required by the Bastardy Act.

Scrutton, *L. J.*:

> "I quite agree with what was said in *Wiedemann v. Walpole*, (1891) 2 Q. B. 534, and what has been said in the present case, that the mere fact of receiving a statement by letter is not enough to justify justices or a jury in finding corroboration."

ROMAN LAW.

The rule is as old as the Roman law. *Scriptura pro scribente nihil probat.* L. 10, D. XXII. 5.

It has been said that a self-serving letter may be admitted if it is a part of a correspondence. But this letter was not that.

It may be admitted if it is a notice or demand. It certainly was not a notice. Nor was it a demand. Such a letter, if it contain a notice or a demand, can be rendered admissible only when proof of a notice or a demand is a necessary prerequisite of the plaintiff's case. But no notice or demand was necessary to be proved here.

The letter was, in fact, a mere statement of the alleged transaction from the writer's point of view. As was said by Wallace, *C. J.*, in *Packer v. U. S.*, 106 Fed. 906 (*supra*, p. 171), "it was a narrative of past events, of which there was no other evidence."

Even if, in addition to its "narrative of acts," it had contained a demand, essential as such to the proof of the plaintiff's case, it would have been the duty of the trial Judge, while admitting the demand part of the letter, *to have cautioned the jury not to consider the self-serving statement of facts contained in it*, and to charge them that that statement was not evidence to prove that the defendant's bond salesman had authority on behalf of his principal to make the alleged con-

tracts of repurchase, or that the defendant had ratified the salesman's act. This appears in

Gaskill v. Skene, 14 Ad. & E. (N. S.) 664.

The letters admitted there amounted to little more than *a demand*. So far as they tended to set forth the facts of the plaintiff's case, they were held to be inadmissible.

Coleridge, *J.*, criticized what, he said, "may be a mischievous attempt to manufacture evidence by making a tricky statement of the party's case and then offering it in evidence as having been served on the other party as a demand." *

Allan v. Peters, 4 Phila. 78 (1860).

This case came up in the old District Court of Philadelphia, an able and experienced court long presided over by Judge Sharswood and Judge Mitchell, both of whom were afterwards Chief Justices of the Supreme Court of Pennsylvania, and Judge J. I. Clark Hare. It tried for many years practically all of the *nisi prius* cases in Philadelphia. Judge Stroud was considered by the Philadelphia Bar as an able *nisi prius* judge.

Stroud, *J.*, in setting aside the verdict, said:

> "We think this decision places the subject on its true grounds; and the result of the whole of the cases seems to be, that an unanswered letter offered by the party by or for whom it was written, if it be restricted to making a *demand where this is requisite, or giving a notice merely*, is always admissible; that, if it contain statements of a different nature, and evidently framed for a different

*In citing this case, no reflection is intended. It is cited only to show the danger of a rule admitting such a letter.

purpose, and these derive no support from other evidence in the cause, it should be wholly excluded; but, if the statements do not go beyond what is necessary to render the *demand or notice* intelligible, or there is other consentaneous evidence, the whole may be submitted to the consideration of the jury. But that it is the duty of the court, whenever such a letter is received, to *scan its contents rigorously*, and make such discriminating observations to the jury that they may be prevented from giving undue weight to what has been so written."

Point 5.

There is a lack of uniformity in the decisions of the various Circuit Courts of Appeals as to whether or not, under the Conformity Acts, the Federal Courts are, in the trial of a common law case, bound to follow the rules of evidence of the highest court of the state in which the trial is held.

The cases in Circuit Courts of Appeals which follow refused to apply State decisions on rules of evidence, or, at least, considered that the question had never been passed upon by this Court.

Chicago & N. W. Ry Co. v. Kendall, 167 Fed 62, 64. Sanborn and Hook, *C. JJ.*, Amidon, *D. J.* (8th Circ.)

The question there was whether the court had the power to compel the plaintiff to submit to a physical examination. It was urged that the Supreme Court of Iowa in *Schroeder v. Chicago, R. I. & P. R. Co.*, 47 Ia. 378, had held that at common law and independently of statute, the court had power in an action for personal injuries to compel the plaintiff to submit himself to the examination of physicians.

The opinion cites *Union Pac. R. Co. v. Botsford*, 141 U. S. 250, and *Camden Railway Co. v. Stetson*, 177

U. S. 172, as holding that Federal courts did not possess such power. It held that on a question of practice the decisions of state courts are not binding upon Federal courts and that it must follow the decisions of the Supreme Court of the United States in the Botsford case.

The court then discussed the case as involving a rule of evidence, saying that "the point had never been directly involved and passed into judgment as to state decisions touching a general common law rule of evidence."

The opinion quoted from the opinion in *Nashua Savings Bank v. Anglo American Co.*, 189 U. S. 221:

> "The laws of the several states with respect to evidence within the meaning of this section apply not only to the statutes, but to the decisions of their highest courts."

but proceeded to say that

> "the language just quoted was not necessary for the determination of the question before the court."
>
> "We do not consider the question as settled by any decision of the Supreme Court of the United States."

The opinion (p. 70) gives the following reasons for this decision:

> "Such a practice would, in our judgment, result in unnecessary labor and perplexity for federal judges in the trial of causes. It is the duty of such judges to be familiar with the decisions of the national courts. The rules of evidence are a part of the law that must in the main be carried in the mind of the trial judge. Such questions constantly recur, and must be promptly decided.

decisions in various Circuits and with all other decisions which counsel have found.

As against this mass of uniform authorities we ask attention to the essential part of the opinion in the Circuit Court of Appeals in the present case (R.):

> "On the other hand, if this letter, self-serving though it be, was received by Leach & Company, then in the peculiar circumstances of this case *the more self serving it was in its assertions, the more insistently it called for disaffirmance by Leach & Company*, and if not disaffirmed and repudiated, its self asserting statements created an acquiescing and consenting situation against Leach & Company from which a jury might infer that Mather had been authorized to make the statements, or, that having made them, Leach & Company had ratified them. Being pertinent and evidential on the question of ratification, we are of opinion the Judge committed no error in admitting the letter."

There do not appear to be any "peculiar circumstances" which take this case out of the uniform line of cases. The learned Court has not set them forth.

The above language of the Circuit Court of Appeals refers to the letter as being a "ratification" of the alleged repurchase agreements.

But that is to reverse the argument and to use the legal effect of the letter if admitted in evidence as an argument in favor of its admission. Clearly, the admissibility of the letter must first be established before we come to consider its legal effect. The logic of the Court appears to be faulty.

If this letter were admissible upon the ground that it was a ratification, then, on the same ground, half the cases in which unanswered self serving letters were rejected would have been cases of ratification and the letters would have been admitted.

If Peirson had added to his letter: "If you do not answer this letter, I shall take it to be a ratification of

your agent's authority", he could not in such a way have made evidence for himself.

The plaintiff's counsel in the Circuit Court of Appeals argued that the letter *was* answered, that is to say, that Peirson testified (R. 97) that Mather, the agent, called on him the day after the date of the letter and discussed with him a loan of $15,000 to plaintiff with the Massachusetts bonds as collateral. But nothing was said by either of them at this interview about this letter or about any repurchase agreements. (R. 111.)

This contention is rather strained. And it is not proved that the agent had authority to "answer" the letter by calling on the plaintiff.

Besides, the Circuit Court of Appeals disregarded this contention and based its decision entirely on the question of the admissibility of an *unanswered*, self-serving letter.

We submit that the case presented in this petition raises a question of uniformity of decisions which is one of the usual grounds for the grant of the writ. A question of evidence which has been passed upon by the highest Courts in a score of jurisdictions and which constantly arises in the trial of cases, appears to be a case of general importance. That it relates to a rule of evidence does not lessen its importance. Rules of Evidence are often quite as important in the administration of justice as rules of substantive law.

> "The rules of evidence are of great importance, and cannot be departed from without endangering private as well as public rights." Story, *J.*, in *Nicholls v. Webb*, 8 Wheat. 326, 332.

Of this the case at bar is a notable illustration. This action to recover nearly $28,000 depended solely upon the admissibility in evidence of this unanswered, self-serving letter. If rejected, the plaintiff would have had no case (admittedly).

The Conformity Acts.

*Under These Acts Federal Courts Are Bound Upon Questions of Evidence to Follow the decisions of the Highest Court of the State in Which the Trial Is Held.**

Bucher v. Cheshire R. Co., 125 U. S. 555, 583 (1888).

"It is also well settled that where a course of decisions, whether founded upon statutes or not, have become rules of property as laid down by the highest courts of the State, by which is meant those rules governing the descent, transfer, or sale of property, and the rules which affect the title and possession thereto, they are to be treated as laws of that State by the Federal Courts.

"*The principle also applies to rules of evidence.* In *Ex parte Fisk*, 113 U. S. 713, 720, the court said: 'It has been often decided in this court that in actions at law in the courts of the United States the rules of evidence and the law of evidence generally of the State prevail in those courts.' See also *Wilcox v. Hunt*, 13 Pet. 378; *Ryan v. Bindley*, 1 Wall. 66."

Nashua Savings Bank v. Anglo-American Co., 189 U. S. 221, 228 (1903).

"The 'laws of the several states' *with respect to evidence* within the meaning of this section [R.

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*See note *M'Neil*, 13 Wall. 236, 243.

"A party forfeits nothing by going into a Federal tribunal. Jurisdiction having attached, his case is tried there upon the same principles, and its determination is governed by the same considerations, as if it had been brought in the proper State tribunal of the same locality."

Dunn v. Coon, 16 Wall. 203, 221.

"A party going into a National court does not lose any right or appropriate remedy of which he might have availed himself in the State courts of the same locality."

S. Sec. 721] apply not only to the statute *but to the decisions of their highest courts. Bucher v. Cheshire Railroad Co.*, 125 U. S. 555; *Ex parte Fisk*, 113 U. S. 713, 720; *Ryan v. Bindley*, 1 Wall. 66."

Notwithstanding these two decisions, there seems to be, at least in two of the Circuits, uncertainty of decision as to the scope and effect of the Conformity Acts. We refer to the two following cases:

Chicago & N. W. Ry. Co. v. Kendall, 167 Fed. 62, 64. Sanborn and Hook, *C. JJ.*, Amidon, *D. J.* (8th Circ.).

The question was whether the court had the power to compel the plaintiff to submit to a physical examination. It was urged that the Supreme Court of Iowa in *Schroeder v. Chicago, R. I. & P. R. Co.*, 47 Ia. 378, had held that at common law and independently of statute, the court had power in an action for personal injuries to compel the plaintiff to submit himself to the examination of physicians.

The opinion cites *Union Pac. R. Co. v. Botsford*, 141 U. S. 250, and *Camden Railway Co. v. Stetson*, 177 U. S. 172, as holding that Federal courts did not possess such power. It held that on a question of practice the decisions of state courts are not binding upon Federal courts and that it must follow the decisions of the Supreme Court of the United States in the Botsford case.

The court then discussed the case as involving a rule of evidence, saying that "the point had never been directly involved and passed into judgment as to state decisions touching a general common law rule of evidence."

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> "The laws of the several states with respect to evidence within the meaning of this section apply not only to the statutes, but to the decisions of their highest courts."

and proceeded to say that

> "the language just quoted was not necessary for the determination of the question before the court."

And cited U. P. R. Co. v. Yates, 79 Fed., as holding that state decisions on evidence "are not obligatory on Federal Courts."

* * * * * * * * *

> "We do not consider the question as settled by any decision of the Supreme Court of the United States."

* * * * * * * * *

> "A somewhat careful examination has failed to discover any instance in which a federal court has treated a local decision on a question of evidence as a rule of law of controlling force in opposition to a decision of the Supreme Court of the United States."

* * * * * * * * *

> "If, therefore, the question involved in the present case be regarded as a question of evidence, we are of the opinion that the decision of the Supreme Court in *Union Pacific v. Botsford*, 141 U. S. 250, is binding upon federal courts, and, if applicable, should be the rule of decision in the present case, notwithstanding the decision of the Supreme Court of Iowa in *Schroeder v. Chicago, R. I. & P. R. Co.*, 47 Iowa 378."

E. I. du Pont de Nemours & Co. v. Tomlinson, et al., 296 Fed. 634, 642.

C. C. of A., 4th Circ.

These were suits brought by the plaintiff in error against defendants in error to recover the value of shipments of nitrate of soda claimed by it. The question arose as to the admissibility in evidence of records of the railroad company as evidence for the ship from which a particular car was loaded, without the production of the employee who made the entries in the railroad company's records.

It was contended that whatever might be the general rule of evidence applicable to cases of this kind, this case should be governed by the law of evidence obtaining in the state courts of North Carolina, under which this documentary evidence was inadmissible, and it was claimed that under the Conformity Act the state law of evidence was binding upon the Federal courts sitting within the state.

In reversing the judgment, the opinion of the court said:

> "It cannot be said that this rule is well settled by the decisions of the federal courts. It has been decided, notwithstanding the federal statutes above cited, that the decisions of state courts relating to general commercial law, or to the law of negligence, are not laws within the meaning of R. S., Sec. 721 (*Swift v. Tyson*, 16 Pet. 1, 10 L. Ed. 865; *B. & O. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772), and to the same effect with reference to the law of evidence (*Chicago & Northwestern R. Co. v. Kendall*, 167 Fed. 62, 93 C. C. A. 422, 16 Ann. Cas. 560). On the other hand, there are decisions of the federal courts which hold, without extended discussion, that the law of evidence of the several states, within the meaning of section 721, R. S., applies not only to statutes, but to decisions of their highest courts. *Nashua Savings Bank v. Anglo-American Co.*, 189 U. S. 221, 23 Sup. Ct. 517, 47 L. Ed. 782; *A. A. Co. v. Hogan*, 213 Fed. 416, 130 C. C. A. 52; *Myers v. Moore* (C. C. A.) 279 Fed. 233, 25 A. L. R. 1

"The principle underlying the distinction between the respect to be given by federal courts to state decisions on commercial law and the law of negligence, on the one hand, and the law of evidence, on the other, has not been clearly enunciated."

It will be convenient to cite the following Federal cases:

American Agricultural Chemical Co. v. Hogan, 213 Fed. 416, 420 (C. C. of A., 1st Circ.).

"Ordinarily, the rules of evidence and the law of evidence of the state prevail in the federal courts sitting within the limits of the state. *Ryan v. Bindley*, 1 Wall. 66; *Bucher v. Cheshire R. Co.*, 125 U. S. 555, 583; *Ex parte Fisk*, 113 U. S. 713, 720; *Nashua Savings Bank v. Anglo American Co.*, 189 U. S. 221, 228. In *Conrad v. Griffey*, 16 How. 38, 47, the rule as generally established is applied, with the remark, 'The rule of evidence is a salutary one, and *cannot be dispensed with in the courts of the United States.*"

Myers et al. v. Moore-Kyle Co., 279 Fed. 233, 237 (C. C. of A., 5th Circ.).

"I concur in the judgment of the court upon the single ground that the sufficiency of the proof offered has been settled as a rule of evidence in Texas by the Supreme Court of that State. *Bucher v. Cheshire R. R. Co.*, 125 U. S. 555; *Nashua Savings Bank v. Anglo-American Co.*, 189 U. S. 221."

American Issue Pub. Co. et al. v. Sloan, 248 Fed. 251, 253 (C. C. of A., 6th Circ.).

"The result of the Conformity Act (Rev. Stat. Sec. 914; Comp. StSat. 1916, Sec. 1537), the Rules of Decision Act (Rev. Stat. Sec. 721; Comp.

Stat. 1916, Sec. 1538), and the Competency of Witnesses Act (Rev. Stat. Sec. 858; Comp. Stat. 1916, Sec. 1464), is to make state statutes relating to the competency of witnesses and the competency of testimony, as well as the state law of evidence generally, binding on the federal courts sitting within such state, except where in conflict with the federal Constitution, statutes, or treaties."

Franklin Sugar Co. v. Luray Supply Co., 6 Fed. (2d) 218, 220 (C. C. of A., 4th Circuit).

This was an action to recover damages for breach of a contract for the future delivery of sugar

"The fact that this court is bound by and should follow the decisions of the highest court of the state on the subject of the admissibility of testimony is in our opinion beyond controversy, and we are required so to do as well by statutes of the United StSates (R. S. Sec. 721, 914; Comp. Stat. Sec. 1538, 1537), as by the decisions of its courts. *McNeil v. Holbrook*, 12 Pet. 84; *Vance v. Campbell*, 1 Black 427; *Conn. Mut. Life Ins. Co. v. Union Trust Co.*, 112 U. S. 250; *Bucher v. Cheshire R. Co.*, 125 U. S. 555; *Nashua Savings Bank v. Anglo-American Co.*, 189 U. S. 221; *Central Vermont R. Co. v. White*, 238 U. S. 507; *Hinds v. Keith*, 57 F. 10; *Stewart v. Morris*, 88 F. 461; *Pooler v. United States*, 127 F. 519; *American Agricultural etc. Co. v. Hogan*, 213 F. 416; *American Issue Pub. Co. v. Sloan*, 248 F. 251; *Myers v. Moore-Kyle Co.*, 279 F. 233.

"We are not unaware that the Circuit Courts of Appeal for two circuits, the Sixth and the Eighth, have held that the federal courts are not bound to follow the decisions of the highest courts of the state in which they are sitting as to the admissibility of testimony. *Louisville & Nashville Railroad v. McClish*, 115 F. 268; *West Tennessee Grain Co. v. J. C. Shaffer*, 299 F. 197, and *Chicago & Northwestern Railway Co. v. Kendall*, 167 F. 62."

Apparently there is a lack of uniformity in the Federal cases.

Here appears to be ground, it is submitted, for the exercise by the court of its jurisdiction in this case to bring up the record for review.

There is another reason—a far weightier reason—for reviewing this case. It raises a question of the relations of the general Government to the States under our dual form of government. In these days of centralizing tendencies, this subject has become more important than ever before. It is to this court that we must look to maintain the constitutional relations between the United States and the States. The present question is, therefore, one of grave importance for the elucidation and settlement of which it is submitted that the court should not hesitate to issue its writ of certiorari.

The importance of this contention can best be shown by quoting from the dissenting opinion of Mr. Justice Field in *B. & O. R. Co. v. Baugh*, 149 U. S. 368, 402:

> "'We have said,' continues the court in the same case [*The Collector v. Day*, 11 Wall. 113, 124] 'that one of the reserved powers was that to establish a judicial department; it would have been more accurate, and in accordance with the existing state of things at the time, to have said the power to maintain a judicial department. All of the thirteen States were in possession of this power, and had exercised it at the adoption of the Constitution; and it is not pretended that any grant of it to the general government is found in that instrument. It is, therefore, one of the sovereign powers vested in the States by their constitutions, which remained unaltered and unimpaired, and in respect to which the State is as independent of the general government as that government is independent of the States.'

"Such being the nature of the judicial department, and the free exercise of its powers being essential to the independence of the States, how can it be said that its decisions as to the law of the State, upon a matter subject to its cognizance, can be ignored and set aside by the courts of the United States for the law or supposed law of another State or sovereignty, be it the general or special law of that State or sovereignty? If a Federal court exercise its duties within one of the States where the law on the subject under consideration is uncertain and unsettled, 'where,' as Chief Justice Marshall said, 'the state courts afford no light,' it must, as we have already stated, exercise an independent judgment thereon, and pronounce such judgment as it seems just. But no foreign law, or law out of the State, whether general or special, or any conception of the court as to what the law ought to be, has any place for consideration where the law of the State in which the action is pending is settled and certain. A law of the State of that character, whether expressed in the form of a statute or in the decisions of the judicial department of the government, cannot be disregarded and overruled, and another law, or notion of what the law should be, substituted in its place without a manifest usurpation by the Federal authorities. I cannot permit myself to believe that any such conclusion, when more fully examined, will ultimately be sustained by this court. I have an abiding faith that this, like other errors, will, in the end 'die among its worshippers.'

. . . . . .

"As said by the Supreme Court of Pennsylvania at an early day—as far back as 1798—'the government of the United States forms a part of the government of each State.' *Respublica v. Cobbett*, 3 Dall. 473. To which the same court, over a half century later, added: 'It follows that its courts are the courts of each State; they administer justice according to the laws of the State as construed and settled by its own supreme tribunal.

This has been more than once solemnly determined by the Supreme Court of the Union to be the rule of their decision, whenever the construction of the Constitution of the United States, treaties, or acts of Congress does not come in question.' *Commonwealth v. Pittsburgh and Connellsville Railroad*, 58 Penn. St. 44."

Binding instructions for defendant should have been given, as prayed, because defendant produced two credible witnesses (the two chief officers in charge of defendant's Philadelphia office) who testified that the letter of May 9th had not been received, against which the plaintiff produced no direct evidence but only evidence tending to prove mailing which created a mere inference that the letter was in fact received.

There was no question of veracity as between witnesses. It was the evidence of the two chief officers of the defendant who testified directly and positively that the letter had not been received. No witness testified that it had been received.

Under the Conformity Acts the trial court was bound by the authority of the decisions in the Supreme Court of Pennsylvania to give binding instructions for the defendant. Those cases are as follows:

Lauger v. Lehigh Valley R. R. Co., 196 Pa. 610, 613.

"When the testimony is not in itself improbable, is not a variance with any proved or admitted facts, or with ordinary experience, and comes from witnesses whose candor there is no apparent ground for doubting, *the jury is not at liberty to indulge in a capricious disbelief.* If they do so, it is the duty of the court to set the verdict aside. Such cases are exceptional, but this is one of them."

The error assigned was in submitting the case to the jury.

Walters v. American Bridge Co., 234 Pa. 7.

Action for damages for personal injuries. The Court below entered judgment for the defendant *n. o. v.*

> "In a negligence case where the oral testimony on the part of the defendant as to an independent contract under which the work was done is not in itself improbable, is not at variance with any proof or admitted facts or with ordinary experience, and comes from witnesses whose candor there is no ground for doubting, a jury ought not to be permitted to indulge in a capricious disbelief of their testimony and binding instructions for the defendant are proper.
>
> "That it [the contractor] the contractor actually did the work as an independent contractor was clearly established by the testimony of Nelson and Acklin, the latter being foreman of the Contracting Company. These were two entirely disinterested witnesses, and the jury could have no reason for doubting their candor or questioning their credibility.
>
> "Judgment affirmed."

Timlin v. American Patriots, 249 Pa. 465.

There the jury capriciously disbelieved a candid and credible witness. On a writ of error is was held that the trial Court ought to have given binding instructions for defendant, and, not having done so, ought to have entered judgment for the defendant.

The error assigned was the refusal to direct a verdict for defendant. In reversing the judgment the Court said:

> "The testimony offered by the defendant to defeat a recovery against it was of a nature to do so; the date of the death of Dr. McLæan, as established by the testimony of Dr. Bessey, was not at

variance with any proved or admitted fact, and there was no ground for doubting the candor of the witness who fixed it. The jury ought not to have been permitted to capriciously disbelieve him on a material matter, but should have been instructed that the plaintiff could not recover: *Longer v. Lehigh Valley R. R. Co.*, 196 Pa. 610."

McNeir v. Wallace, 252 Pa. 323, 325.

In that case the defendant testified on his own behalf. The jury disregarded his evidence and found for the plaintiff. The trial Court entered judgment *n. o. v.* for defendant. The judgment was affirmed. The Court said:

"Under these circumstances the Court below was right in entering judgment for the defendant *non obstante veredicto*. A verdict which plainly indicates that the jury indulged in a capricious disbelief of the testimony, should not be permitted to stand."

CONCLUSION.

It is submitted:

(a) The admission of the unanswered, self-serving letter was error—

(a) Under all the authorities.

(b) Under the Conformity Acts.

The refusal of binding instructions for defendant was error—

(a) Because, if the letter was erroneously admitted, there was no evidence to prove the authority of the agent.

(b) Because, under the Conformity Acts, the jury could not reject the direct evidence of two credible witnesses that it had not been received, as held by the Pennsylvania decisions.

The judgment of the Circuit Court of Appeals

was not in uniformity with the decisions of other Circuits.

The failure of the Circuit Court of Appeals to follow, under the Conformity Acts, the settled rules of the Supreme Court of Pennsylvania,

(a) Rejecting unanswered, self-serving letters.

(b) Giving binding instructions for defendant on the ground that the direct evidence of two credible witnesses as in the present case could not be rejected by the jury.

The questions here involve uniformity in the Circuits and are "questions of importance which it is in the public interest to have decided by this Court of last resort."

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